No. 86 1486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Respondent,

v.

MICHAEL THOMAS TIMMERMANN,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT B. SCHULMAN,
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Attorneys for Petitioner.

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals' affirmance of the district court's denial of Petitioner's pre-trial request for a continuance due to the uncontested unavailability of a material witness violated Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Respondent,

v.

MICHAEL THOMAS TIMMERMANN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION OF THE COURT BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is set forth verbatim in the Appendix ("Appx.") at 1-14.

STATEMENT OF JURISDICTION

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit was filed December 3, 1986. Pursuant to Fed. R. App. P. 35(b), 40, and 41, Petitioner timely filed a Petition for Rehearing or, Alternatively, Suggestion of Rehearing En Banc and Stay of Mandate that Petitioner was denied on January 15, 1987 (Appx. at 15-16). Petitioner's Motion for Stay of Mandate was denied February 13, 1987 (Appx. at 17-18). The mandate issued that day.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Sup. Ct. R. 17(c).

STATEMENT OF THE CASE

On March 5, 1985, a jury was sworn and a trial commenced against ten defendants, including Petitioner, in the United States District Court of the District of Maryland. Defendants were charged with

conspiracy to distribute cocaine and separate substantive offenses. For three weeks, the Government introduced the testimony of five co-conspirators and numerous exhibits corroborating their testimony and arguably linking the defendants to the crimes charged.

On March 21, 1985, the Government called Special Agent Flannery, the case agent-in-charge, as a witness. During Special Agent Flannery's direct testimony, defendants moved for and were granted a mistrial. Joint motions to dismiss the indictment on double jeopardy grounds were denied. Retrial was eventually scheduled to commence on September 29, 1985.

On or about September 26, 1985, counsel for Jeffrey Harris, the central defendant, requested a continuance of his trial and a severance because only days before Harris had been committed to a psychiatric institute and would be unavailable for

trial. In a hearing in chambers, the district court granted Harris' motion and severed him from the trial of the remaining defendants. At the same time, the district court denied the joint requests of defendants for a continuance and Petitioner's oral motion for severance and ordered that the trial begin on September 29, 1985.

On September 29, 1985, Petitioner filed a written motion for continuance or, in the alternative, for severance in support of the oral motion made at the September 26, 1985 chambers conference (Appx. at 19-22). An affidavit in support of that motion was also filed (Appx. at 23-27). In those written submissions, Petitioner and his counsel explained that Harris had exculpatory testimony which he would have provided in a joint trial with Petitioner. More particularly, Harris, a co-defendant and the person alleged to be the link

between Petitioner and chief Government witness Alan Bozman, would have testified that he had known Petitioner through high school and beyond, that he has never sold cocaine to Petitioner nor had he ever seen Petitioner use cocaine, that at no time was Petitioner a customer of his, that he had given Bozman Petitioner's telephone number for the purpose of becoming manager in a developing hot tub business; and that he wanted Petitioner to manage the business because of Petitioner's previous managerial experience at a McDonalds restaurant. Thus, Harris' testimony was Petitioner's only direct evidence to rebut Bozman, who was the only witness to provide testimony concerning the pertinent narcotics transactions.

Following the retrial, Petitioner was convicted on all counts. Petitioner was sentenced to three years imprisonment with parole eligibility to be governed by 18

U.S.C. §4205(b)(2). A special parole term of three years was also imposed.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of the request for continuance by stating, "Timmermann did not attempt to subpoena Harris. There is no showing that had he been subpoenaed he would not have been available. He may not now complain of Harris' absence." (Appx. at 12).

ARGUMENT

The court of appeals' affirmance of the district court's denial of Petitioner's pre-trial request for a continuance due to the uncontested unavailability of a material witness violated Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution.

The aforequoted ruling by the Fourth Circuit is erroneous for several reasons. First, by relying on counsel's failure to

subpoena Harris, the court of appeals based its judgment on an issue rejected by the district court and not raised by the Government pre-trial when the request for continuance was originally made. Second, contrary to the per curiam opinion, there was ample evidence in the record that Harris was unavailable inasmuch as the district court had ruled that Harris was unavailable and the Government conceded Harris' unavailability and objected to Petitioner's request for continuance during trial to determine Harris' availability. Third, by relying on matters occurring during trial, the Fourth Circuit ignored its previous holdings relevant to continuance motions. For these reasons, a writ of certiorari should issue and Petitioner's convictions should be reversed.

A.

The need for counsel to subpoena Harris

was not raised by the government pre-trial when the continuance was requested. In fact, the government conceded his unavailability for the duration of the trial. This was the basis for the government's opposition to the requested continuance. In the government's words, Harris' unavailability was the "law of the case." Furthermore, although Harris was not subpoenaed during the trial, Petitioner's counsel did request a continuance to determine Harris' availability. The government responded by indicating that subpoenaing Harris would be an exercise in futility.

Thereafter, despite having proceeded on the basis of Harris' unavailability at trial, the government later raised the subpoena issue post-trial during argument on the Petitioner's motion for new trial. Significantly, that was not the basis upon which the district court decided the

issue.

In United States v. Clinger, 681 F.2d 221 (4th Cir.), cert denied, 459 U.S. 912 (1982), the Fourth Circuit stated that five elements shall be examined where a defendant seeks a continuance to produce a witness: (1) who the witness is; (2) what the witness' testimony will be; (3) whether the testimony will be competent and relevant to the issues in the case; (4) whether the witness can probably be obtained if the continuance is granted; and (5) whether due diligence has been used to obtain the witness for the trial as set. Id. at 223 (quoting Neufield v. United States, 188 F.2d 375, 380 (D.C. Cir. 1941)). The district court grounded its denial of the continuance request upon the fourth factor. The Fourth Circuit, however, substituted its judgment for that of the district court and based its judgment on the fifth standard, i.e., a

lack of due diligence for failure to subpoena the witness. This was simply not an issue before the district court. In fact, the district court rejected it and that determination should not have been disturbed on appeal absent a showing of an abuse of discretion or, at the very least, a remand for further proceedings on the issue of due diligence.

Even if due diligence should have been considered, the appellate panel has misapplied it. The due diligence standard in Clinger is that associated with the timing of the request for the continuance pre-trial and not with the failure to subpoena a witness during trial. The continuance cases deal with "due diligence" in the context of the timing of counsel's request. See, e.g., United States v. Baldwin, 624 F.2d 1228, 1231 (4th Cir.) cert denied, 449 U.S. 1124 (1980). Here, the district court found

counsel to have moved "promptly." The request was made immediately upon learning of Harris' unavailability at the time the district court had found Harris unable to participate in the trial and when a severance was granted. To look, as the appellate court did, at trial proceedings ignores the very teachings of Clinger which focused on the district court's decision pre-trial and the circumstances that existed then.

Apparently, the court of appeals was satisfied that the other Clinger factors were satisfied, including the importance of Harris' testimony. The panel obviously concluded that Harris' testimony could be obtained if the continuance was granted, the very issue on which Petitioner based his requests and arguments below and the issue the district court decided. The Petitioner, however, was denied the ability to present his defense to a jury

because his counsel relied on the district court's ruling of unavailability, the government's representation that such a ruling was the law of the case, and the government's opposition to a mid-trial continuance to determine availability. The Fourth Circuit's opinion teaches counsel that such reliance is misplaced.

Manifestly, Harris' testimony squarely contradicted the only government witness who provided direct testimony against the Petitioner. It supported Petitioner's theory of the case and to have denied Petitioner the opportunity to present such testimony because of counsel's reliance on pre-trial rulings, government representations and the apparent futility of issuing a subpoena denied the Petitioner a fair trial, due process and effective assistance of counsel.

The result fashioned by the court of appeals not only ignores the record but is

fundamentally unfair. The panel's analysis denies Petitioner a meaningful opportunity to produce evidence which went to the heart of the government's case or even to determine more accurately when the evidence (Harris' testimony) would be available. Given the importance of Harris' testimony, the result was that the district court's "insistence upon expeditiousness in the face of a justifiable request for delay [rendered] the right to defend with counsel an empty formality." Unger v. Sarafite, 376 U.S. 575, 589 (1964).

B.

The district court repeatedly ruled that Harris was unavailable for the trial. In the most specific terms, it sta ed "the Court determined pre-trial that Mr. Harris was unavailable and might be for some time." Such a ruling was consistent with the facts of the case and the arguments of

the government. The government repeatedly conceded the appropriateness of the district court's factual finding - a finding that should not have been disturbed on appeal absent an abuse of discretion and went so far as to state that it was the law of the case. This finding was reiterated by the district court when, in granting bond pending appeal on the continuance issue, the Court noted, "the unavailable witness was not merely another witness, but was a co-defendant [Jeffrey Harris]..." (emphasis added). As events unfolded, Harris was not discharged from the psychiatric institute until shortly after the trial ended.

In the face of this record, issuing a subpoena for Harris would have been futile and would necessarily have resulted in the very situation the government objected to during the trial. To require the Peti-

tioner, as Fourth Circuit apparently would have him do, to subpoena Harris simply to learn what was otherwise apparent to all concerned would have been an exercise in futility. Additionally, as noted above, the government's objection to the continuance was not based upon the need for defense counsel to subpoena Harris but was based on the pre-trial determination by the Court that Harris would be unavailable for the pendency of the trial.

C.

The Fourth Circuit's opinions instructs Petitioner's counsel to ignore both Court rulings and government representations. Moreover, to require Petitioner's counsel to issue a subpoena for Harris would require the very kind of mini-trial concerning his availability that the government represented at the time the issue was first raised that it was not prepared to engage in. The record

reflects that Petitioner's counsel moved promptly and with due diligence. Once Harris moved for severance and was declared unavailable, Petitioner immediately requested a continuance. This request was reviewed during the trial. At each point the government objected and the district court denied the request. Any fair reading of the transcript indicated that even had counsel sought to subpoena Mr. Harris, it would have been evident that the government would have objected and the same end result would have occurred. Having been denied the opportunity to subpoena Harris to determine his unavailability, counsel cannot now be faulted for not in fact doing it.

Lastly, issuing a subpoena is not a prerequisite for having a continuance granted. In the case most strikingly similar to this one, Shirley v. North Carolina, 528 F.2d 819, 821-23, (4th Cir.

1975), defense counsel attempted to "negotiate" for the attendance of the crucial witness. He was diligent but unsuccessful. No subpoena, however, was issued. The appellate court did not decide that case on counsel's failure to subpoena or secure some other process to compel attendance. Rather, the Court looked at the importance of the testimony and its necessity in the search for the truth. The result should have been no different here. To require otherwise, as the panel does, elevates form over substance and denies the Petitioner the opportunity to present his case to the jury through the error of his counsel.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit and that its decision be reversed.

Respectfully submitted,

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Attorneys for Petitioner

March 16, 1987

No. 86 1486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Respondent,

v.

MICHAEL THOMAS TIMMERMANN,
Petitioner.

JOINT APPENDIX

ROBERT B. SCHULMAN,
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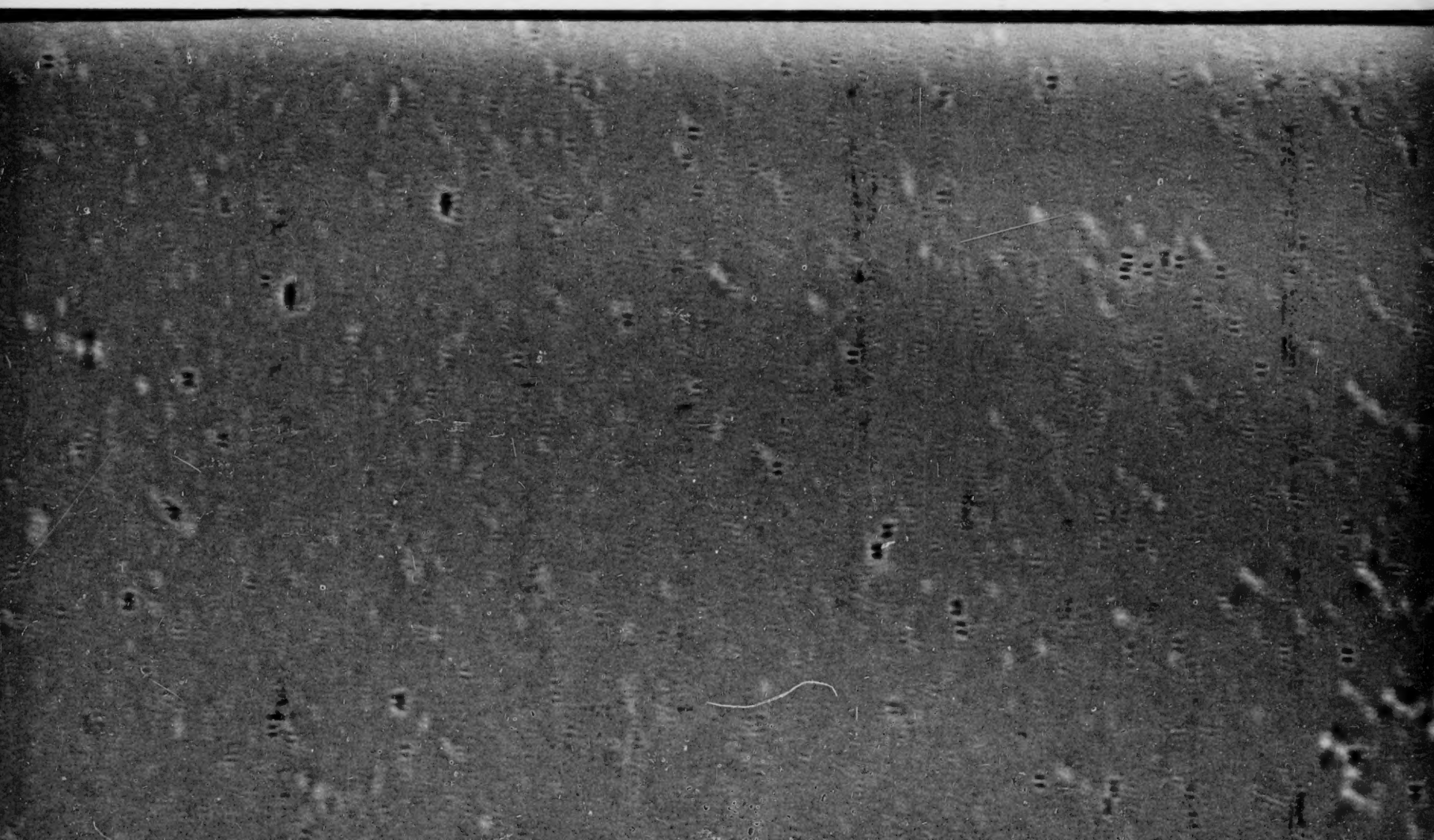

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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United States of America,

Appellee,

versus

Michael Thomas Timmermann,

Appellant.

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United States of America,

Appellee,

versus

Russell Maurice Mattei,

Appellant.

No. 85-5528

United States of America,

Appellee,

versus

Gary Dale Moses,

Appellant.

No. 85-5529

United States of America,

Appellee,

versus

Bernard Albert Campbell,

Appellant.

No. 85-5530

United States of America,

Appellee,

versus

John Christopher Dorsch,

Appellant.

No. 86-5511

United States of America,

Appellee,

versus

Michael Thomas Timmermann,

Appellant.

No. 86-5512

United States of America,

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versus

Russell Maurice Mattei,

Appellant.

No. 86-5513

United States of America,

Appellee,

versus

Gary Dale Moses,

Appellant.

No. 86-5514

United States of America,

Appellee,

versus

Bernard Albert Campbell,

Appellant.

No. 86-5515

United States of America,

Appellee,

versus

John Christopher Dorsch,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Herbert F. Murray,
United States District Judge.
(CR HM-84-00325)

Argued: October 9, 1987
Decided: December 3, 1986

Before HALL, CHAPMAN and WILKINS, Circuit Judges.

Joshua R. Treem; Robert T. Durkin, Jr.; Keith Krissoff; Gregory M. Wilson; James A. Bensfield (Kenneth Robinson; Thomas Dyson on brief) for Appellants; Glenda G. Gordon, Assistant U.S. Attorney (Breckinridge L. Willcox, U.S. Attorney on brief) for Appellee.

PER CURIAM:

Defendants Harris, Timmermann, Mattei, Moses, Campbell, and Dorsch appeal the

trial judge's denial of their motion to dismiss the indictment after a mistrial was declared during their first trial. Subsequently, Harris' case was severed from the others and Defendants Timmermann, Mattei, Moses, Campbell, and Dorsch were retried and convicted by jury of conspiracy to possess cocaine with intent to distribute and possession with intent to distribute. They appeal advancing a number of grounds for the reversal of their convictions. We decline to review Defendant Moses' contention of denial of ineffective assistance of counsel and find no error as to the other issues raised.

I.

This initial statement of the facts is confined to a brief overview of the government's case and to the procedural history. Other pertinent facts will be stated in relation to specific contentions.

From March 1981 through December 1982, Alan Bozman distributed cocaine for a network headed by Defendant Harris. Defendants Timmermann, Mattei, Campbell, and Dorsch bought cocaine from Bozman. Moses was an employee of Bozman who became a runner for Harris. Purchasers made contact with Bozman through an answering service by leaving messages for "John Galt."

In July 1984, a federal grand jury returned an 18-count indictment against 15 individuals, including Bozman and Defendants Harris, Timmermann, Moses, Campbell, and Dorsch, on charges of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute. In August 1984, a superseding indictment was returned adding new substantive counts and substituting Defendant Russell Maurice Mattei for Russell Steven Mattie. This similarity in

names led to the arrest of Russell Steven Mattie who was not involved. This error was corrected and Defendant Russell Maurice Mattei was subsequently arrested.

A jury trial involving the appellants began on March 5, 1985. Bozman entered a guilty plea and became a government witness. The district judge granted a mistrial during the third week of the presentation of the government's case due to improper responses of a government witness. Defendants' motion to dismiss the indictment on grounds of double jeopardy was denied and retrial was set for late September 1985.

On September 26, 1985, Defendant Harris was severed from the case due to his hospitalization. Motions for continuance by the remaining Defendants were denied. Defendants Timmermann, Moses, Campbell, Mattei, and Dorsch proceeded to trial on September 30, 1985 and were convicted on

one count each of conspiracy and possession with intent to distribute. Moses was acquitted on two other counts of possession with intent to distribute.

II.

The trial judge declared a mistrial in the first trial because the DEA agent in charge of the case expressed an opinion as to the guilt of Defendant Mattei when questioned on direct examination about the circumstances of Russell Maurice Mattei's substitution for Russell Steven Mattie in the superseding indictment. Responding to the question, "What did you do that day?" the DEA agent testified: "He told me he was innocent, and from his demeanor, I believed him. I saw truth in his eyes, and I took steps to determine if, in fact, he was the guilty Mr. Mattie [sic] or the innocent Mr. Mattie."

Defendants moved for dismissal of the indictment arguing that the government

intentionally goaded them into seeking a mistrial and thus retrial was barred on grounds of double jeopardy under Oregon v. Kennedy, 456 U.S. 667 (1982). The district judge denied the motion to dismiss finding that although the government may have been negligent in not cautioning the witness, it did not intend to goad a motion for mistrial.

The double jeopardy clause generally does not bar retrial after a mistrial. When an accused obtains a mistrial, he can avoid a second trial only if "the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial...." Oregon v. Kennedy, 456 U.S. at 676. The question of the government's intent is one of fact and the trial court's finding on the issue is subject to the clearly erroneous standard. United States v. Wentz, ___ F.2d ___, No. 85-5243 (4th Cir. Sept. 19, 1986), citing Robinson

v. Wade, 686 F.2d 298, 309 (5th Cir. 1982).

The refusal to dismiss the indictment after granting a mistrial was not reversible error. The question asked by the government--"What did you do that day?"--clearly called for a factual response, rather than an opinion answer. The trial judge expressed the belief that one of the reasons that a cautionary instruction was not given to the witness was the "exemplary fashion in which counsel for both sides had conducted themselves throughout the trial." The factual finding of the trial judge who observed the conduct throughout three weeks of trial is amply supported in this case.

III.

After the mistrial in March 1985, retrial was set for Monday, September 30, 1985. On Tuesday, September 25, 1985, counsel for appellants discovered that

Defendant Harris had checked himself into a hospital. On Thursday, September 26, the district judge heard Defendant Harris' motion for severance and motions for continuance from Defendants Dorsch, Mattei and Timmermann. Dorsch and Mattei sought a delay to allow them time to reassess their cases since Harris' attorney had been "lead" attorney by informal agreement of counsel. Timmermann sought a continuance until Harris would be available to testify on his behalf. The district judge granted the motion for severance and denied the motions for continuance.

We find no abuse of discretion. When a continuance is sought to secure the attendance of a witness, the party requesting the continuance must show who the witness is, what the testimony will be, that the testimony will be competent and relevant under the issues in the case, that the witness can probably be obtained

if the continuance is granted, and that due diligence has been used to obtain his attendance at trial. United States v. Clinger, 681 F.2d 221, 223 (4thCir.), cert. denied, 459 U.S. 912 (1982). Timmermann did not attempt to subpoena Harris. There is no showing that had he been subpoenaed he would not have been available. He may not now complain of Harris' absence.

Counsel had the benefit of participating in three weeks of the presentation of the government's case prior to the mistrial. They had four months to review Jencks Act materials and transcripts of the previous trial. Simply because "lead" counsel is removed from a case is no automatic basis for a continuance. The district judge did not abuse his discretion in denying this motion.

IV.

During the retrial in the middle of the

government's case, the trial judge removed Defendant Moses' counsel at Moses' request. Substitute counsel was immediately appointed and the trial continued without delay. Moses was subsequently convicted on two counts and acquitted on two other counts. He appeals his convictions alleging ineffective assistance of counsel.

We decline to address this issue on the record before us. Defendant Moses is free to raise the issue of the effectiveness of his trial counsel in an application for a writ of habeas corpus under 28 U.S.C.A. §2255 (West 1971).

V.

Defendants Campbell, Mattei and Dorsch challenge several evidentiary rulings by the trial judge. We find no abuse of discretion and reject their contentions.

Finally, Defendants Timmermann, Mattei and Dorsch assert that there was insuffi-

cient evidence to support their convictions. These arguments have no merit. The convictions are supported by the testimony of Bozman and other co-conspirators in addition to other evidence presented by the government.

VI.

In conclusion, the trial judge did not err in denying the motion for dismissal of the indictment on double jeopardy grounds. There was no abuse of his discretion in denying the motions for continuance or in ruling on the various evidentiary issues. The convictions are supported by the evidence. Finally, we decline to address the issue of ineffective assistance of counsel in this direct appeal. Accordingly, the convictions are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-5521
No. 86-5511

United States of America,

Appellee,

versus

Michael Thomas Timmermann,

Appellant.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for

rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Hall and Judge Chapman.

For the Court,

(John M. Greacen)
Clerk

Filed: January 15, 1987

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-5521
No. 86-5511

United States of America,

Appellee,

versus

Michael Thomas Timmermann,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore.
Herbert F. Murray, District Judge.

Upon consideration of appellant's motion to stay mandate,

IT IS ORDERED that the motion is denied.

Entered at the direction of Judge Wilkins with the concurrence of Judge Hall. Judge Chapman had no objection to the staying of the mandate.

For the Court,

(John M. Greacen)
Clerk

Filed: February 13, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
v.	:	Criminal No. HM-84-00325
JEFFREY LANCE HARRIS, et al.	:	

...ooOoo...

MOTION FOR CONTINUANCE
OR IN THE ALTERNATIVE FOR SEVERANCE

Petitioner, Michael T. Timmermann, by his attorney Joshua R. Treem, files this Motion For Continuance Or In The Alternative For Severance and in support of this motion states as follows:

1. On Tuesday, September 24, 1985, counsel was advised that a co-defendant in this case, Jeffrey L. Harris, had been committed to the Psychiatric Institute in Washington, D.C. and would be unavailable for trial for approximately four (4) weeks. Counsel was further advised that Mr. Harris' attorney, Kenneth Robinson, would be petitioning the court for

severance based on those facts that the government would not oppose the severance for Mr. Harris. This Court subsequently severed Mr. Harris from the trial of this case on the basis of his unavailability.

2. As is more fully set forth in the Affidavit in support of this motion which has been filed under seal with the court's permission, Mr. Harris has exculpatory testimony which he would have provided in a joint trial with Mr. Timmermann. Such testimony goes to the heart of the government's proof against Mr. Timmermann and therefore is vital to his defense.

WHEREFORE, the Defendant requests that his motion for continuance be granted and that he be tried with Mr. Harris at Mr. Harris' retrial, or alternatively, that he be severed from the trial of the other defendants who are now scheduled to proceed to trial on September 30, 1985.

Respectfully submitted,

(Joshua R. Treem)
Joshua R. Treem (#00037)
SCHULMAN & TREEM, P.A.
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The World Trade Center
Baltimore, MD 21202
PHONE: 301/332-0850

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Continuance or in the Alternative for Severance was hand-delivered this 30th day of September, 1985 to the following people:

Robert T. Durkin, Jr., Esq.
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Baltimore, MD 21202
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Attorney for Defendant Russell Mattei

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Attorney for Defendant John C. Dorsch

John A. Hayes, Jr., Esq.
1023 Cathedral Street
Baltimore, MD 21201
Attorney for Gary Moses

Glenda G. Gordon, Esq.
Robert Mathias, Esq.
101 W. Lombard Street
8th Floor
Baltimore, MD 21201

(Joshua R. Treem)
Joshua R. Treem

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. HM-84-00325
JEFFREY LANCE HARRIS, et al.	:	

...ooOoo...

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE OR IN THE ALTERNATIVE FOR SEVERANCE

I, Joshua R. Treem, am over eighteen (18) years of age and am competent to give this Affidavit:

1. I am the attorney for Michael T. Timmermann, a defendant in U.S. v. Harris, et al., Criminal No.: HM-84-00325.

2. In preparation for the defense of Mr. Timmermann in the original trial in March of 1985, I interviewed Jeffrey Harris, (a co-defendant and the person alleged to be the link between Mr. Timmermann and the major Government witness Alan Bozman) who indicated that he was planning to testify in that case and

with regard to Mr. Timmermann, would testify as follows:

a) That he has known Michael T. Timmermann through High School and beyond;

b) That he has never sold cocaine to Mr. Timmermann nor has he seen Mr. Timmermann use cocaine;

c) That at no time was Michael T. Timmermann a customer of his;

d) That Mr. Harris gave Alan Bozman Mr. Timmermann's telephone number for the purpose of having Bozman talk to Mr. Timmermann about becoming the manager of the hot tub business that Mr. Harris, Mr. Bozman and Mr. Avanzato were in the process of developing in the fall of 1982;

e) That Harris wanted Mr. Timmermann to become the manager because he knew that Mr. Timmermann had retail management experience through his work at McDonalds and because he did not wish Mr. Avanzato, who he believed was gay, to be

the manager of the hot tub business if for no other reason than that Mr. Avanzato had no management experience and Mr. Harris did not trust him;

3. Mr. Harris' testimony provides direct and contradictory evidence to Mr. Bozman's testimony and also provides an alternative explanation for what the government believes were drug related calls on the answering service used by Mr. Bozman. Furthermore, Mr. Harris' testimony would be consistent with Mr. Bozman's testimony that he did not hear from or receive a telephone call from Mr. Timmermann until some time after October 8, 1982; that Mr. Timmermann was not introduced to Mr. Bozman at the time that the other alleged customers were introduced (i.e. Batson, Rankin and Gonzalvez). It is also consistent with the timing of the phone messages on the answering service which the government will seek to produce.

It is further consistent with the documentary evidence which will show the negotiations for the bank loan, preparation of financial statements and other settlement documents relating to the hot tub business were prepared within the period of October to early December, 1982.

4. Inasmuch as Mr. Harris is the only one who can testify to such information in contradiction of Mr. Bozman, Mr. Harris' testimony is crucial and vital to the defense.

5. On Thursday, September 19, 1985, counsel again spoke with Jeffrey L. Harris, who at that time anticipated proceeding to trial as scheduled and testifying in his own behalf at the retrial. Mr. Harris also confirmed the above testimony and indicated that he would so testify at his trial.

6. On September 26, 1985, Mr. Harris' counsel likewise confirmed the testimony

that Mr. Harris would provide.

(Joshua R. Treem)
Joshua R. Treem

COUNTY OF ANNE ARUNDEL:
SS:
STATE OF MARYLAND:

I HEREBY CERTIFY that on this 30th day of September, 1985, before me, the subscriber, a Notary Public in and for the County of Anne Arundel, State of Maryland, personally appeared Joshua R. Treem and made oath in due form of law that the aforegoing Affidavit in Support of Motion for Continuance or in the Alternative for Severance is true and correct to the best of his knowledge, information and belief.

(Patti K. Skrinak)
NOTARY PUBLIC

MY COMMISSION EXPIRES: 7/1/86